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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Part 90 of the)	PR Docket No. 93-144
Commission's Rules to Facilitate Future)	RM-8117, RM-8030
Development of SMR Systems in the)	RM-8029
800 MHz Frequency Band)	
)	
and)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act - Competitive)	
Bidding)	
800 MHz SMR)	

To: The Commission

REPLY COMMENTS

Applied Technology Group, Inc. (Applied), by its counsel, hereby files Reply comments within the above captioned proceeding and requests that the Commission reject the proposals made within its notice as detrimental to independent, analog SMR operators, without concurrently providing a benefit to the public. In support, the following is stated.

The Basis For The Proposals Is Flawed

One of the primary bases for the Further Notice of Proposed Rule Making ("the Notice") is the misdirected notion that some method of bringing regulatory parity is required between ESMR systems and cellular (or PCS) providers. In its comments, Nextel Communications, Inc. (Nextel) even goes so far as to suggest that such parity is

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statutorily mandated.¹ Nextel's suggestion is specious and insofar as its private agenda motivates the Commission, such motivation is without merit.

Nothing within the applicable statutes suggests that the Commission is obliged to create, out of whole cloth, a competitive position among otherwise differing providers so as to create a justification for regulatory parity. That this bootstrapping analysis is occurring within this proceeding is obvious.

Nextel nee Fleet Call, Inc. operates its ESMR systems in accord with the terms of a waiver of the Commission's Rules. An entity which exists by and through a waiver is hardly positioned to then state that this legal and operational aberration allowed by waiver has attained a status whereby it is now entitled to regulatory parity. This would be a bizarre application of the fundamental principles of spectrum regulation. It would mean that entities which can demonstrate the basis for a waiver, may then claim that by such waiver they have attained an exalted status, which provides them the standing, basis, and entitlement to claim even greater advantages than those entities which did not request an equal waiver.

One is compelled to ask, since when does the Commission provide greater regulatory advantages to waiver recipients, then those entities operating within the strict

¹ Yet publicly Nextel Chairman Morgan O'Brien has denied aspiring to compete with cellular and PCS.

parameters of the Commission's Rules? Certainly Nextel is claiming this strange benefit. But Applied can find no time in the Commission's past when such status was ever afforded an entity which exists largely on the largesse of the Commission.

The Historical Hubris Of Nextel

To recap the regulatory history of Nextel, one notes that it was first a large, traditional SMR provider. It acquired existing systems and built a large, competitive service providing analog dispatch service to thousands of end users. Nextel then attempted to sell the company to a Regional Bell Operating Company.² Unsuccessful in its efforts, Nextel launched its waiver request, stating that its new "ESMR" system would revolutionize the SMR industry by employing digital technology, frequency reuse, and other methods which were intended to mirror the next generation cellular systems. Most importantly, Nextel stated that its system might be brought to the market and fully implemented within the existing SMR environment. The waiver is granted, Nextel goes public, and Nextel claims that it will construct a seamless network throughout the United States by 1995 or 1996, depending on which source is accepted. Billions of dollars in stock is sold, its financial empire grows, its strategic partners begin to line up, and a giant of the industry is born.

² A representative of Bell South confirmed that such negotiations were ongoing and later collapsed due, in some part, to the Commission's continued reluctance to allow wireline companies to compete in the SMR field.

This success story would be laudable, except there exist certain flaws and problems of which Nextel failed to inform the Commission when it started down its heady path. First, Nextel's ability to construct a seamless network within the time frame it claimed was, most charitably, ambitious. A review of its efforts thus far belie its earlier claims. Second, Nextel has not received a waiver of the Commission's Rules regarding alien ownership that would allow it to operate as a CMRS. Without a determination of its status, it is illogical for one to even consider its comments in this proceeding. Thus far, Nextel cannot demonstrate that it possesses the standing necessary to claim any right, entitlement or advantage arising out of its unsupported claim of CMRS status. Third, its touted system has been beset with software problems, technical problems and market acceptance problems. In sum, one must logically conclude that its efforts have been, in large part, a bust. Finally, its financial fortunes have plummeted. Its stock that once sold at over fifty, now hovers below fifteen. It appears that the financial community is looking elsewhere for its investments.

Nor may the Commission applaud Nextel's application/licensing methods. Nextel is presently the greatest warehouse of SMR spectrum in the United States. It is licensed to operate more channels in more markets than any other entity, despite the fact that fewer than fifty percent of those licensed channels are, in fact, constructed; and fewer more are employed to provide ESMR service to a uninterested public.

Despite its failure to actually construct or load channels providing ESMR service, Nextel continues unabated. It recently filed applications for a new ESMR service throughout the state of California, requesting up to 175 channels from San Francisco to Los Angeles. Nextel did not seem to be bothered by the fact that its applications requested spectrum that fully overlapped practically every independent operator in the region. Its answer in paraphrase, "we will later provide the engineering and the showings necessary, however, in the meantime, please accept our applications." This type of behavior is arrogant, unnecessary, and has a chilling effect on the marketplace that must not be rewarded with even greater advantages. Its applications, like so many previous applications, demonstrate Nextel's total disregard for local operators, the Commission's Rules, or the equity which those rules are intended to provide.

That the Commission would even consider providing additional advantages to this entity is quite unfortunate. Politics aside, Nextel has not demonstrated its ability or willingness to abide by the Commission's Rules, the Commission's processes, the mandate against warehousing of spectrum, or the fundamental fairness which is correctly imposed on all other licensees. One would have to search a long time to discover an entity which has acted with such consistent impunity. One might never find one which has been so consistently rewarded despite its disinterest for law and how such law might apply to it.

Nextel's Justifications Are Handmade

Nextel's justification for forced frequency swapping, MTA licensing, and auctions are made by its own hands. That is, Nextel has created the problems, the congestion, the technological mishaps, and now seeks assistance from the Commission in cleaning up its own mess. For example:

- * Nextel claims that the rule making is justified to relieve spectrum congestion. Nextel does not point to its creation of much of this congestion by its filing for scores of channels in areas which do not require such a high level of service due to limited population density.

- * Nextel fails to note that its speculation in spectrum, albeit on a grander scale, was the primary fuel for further speculation by unscrupulous operators who prayed on the hopes of the American public. Nextel is to be congratulated for not engaging in "infomercials", yet, according to its Chairman, Nextel did manipulate members of the press to gain its reputation. One would be hard pressed to determine the moral differences between the use of infomercials and the use of a pliant press, to achieve a similar goal -- investment by a uninformed public. Indeed, a well-funded speculator is still, nonetheless a speculator.

- * Nextel's request for contiguous spectrum arises out of its failure to account for the hostility which existed in the spectrum environment within many urban areas. By the language of its original waiver request, such contiguous spectrum was unnecessary. Now, it claims the contrary. Its change of heart comes too late and at too high a price.

In the language of recent times, Nextel is attempting to characterize itself as a victim and requests that the Commission be both its support group and its savior. This popular approach for excusing a panoply of past misdeeds should be fully rejected by the Commission, which demands greater responsibility and accountability from its regulatees. Nextel is no victim. It is the creator of its own destiny. It has made the errors, misstatements, and miscalculations which had led it to this place. It cannot logically blame any other source for its woes, nor should it be allowed to make victims out of local, analog operators to solve its problems. And, if the Commission adopts the proposals, it will surely do so by victimizing local operators for the singular benefit of Nextel.

An Opportunity To Succeed

A few years ago, the Commission gave Nextel a waiver of its rules, providing Nextel with an opportunity to succeed far beyond that which had been afforded any other SMR operator. That authority is probably best characterized as the Commission's offer of a few benefits in exchange for Nextel's promise to bring forth a new service. Not

only has the Commission delivered on its stated promises within that waiver, a close review of the Commission's records will show that the Commission has gone well beyond the strict language of the grant of the waiver and has provided additional benefits to Nextel which were not contemplated in the waiver grant. It would appear, therefore, that the Commission has fully met its end of the bargain.

Unfortunately, the Commission has little to show for its kind efforts. Nextel's service is anemic. Nextel has spent more energy delivering stock than it has delivering ESMR service to the public. Now it comes before the Commission requesting more and more.

Applied suggests that it is time for the Commission to provide the same opportunity to the hundreds of local, analog operators that it provided to Nextel. Those operators want and demand an opportunity to succeed. The Commission's proposals, if adopted, would remove that potential. Wide-area licensing would concentrate the spectrum in the hands of the few, largest entities, whose ranks shrink each time Nextel announces another merger. Local SMR operators would be precluded from obtaining additional spectrum for providing service to a demanding public. In sum, such licensing would create an untenable chill upon the market that cannot be justified.

Nothing contained within Nextel's comments suggests any justification for curtailing local operators' opportunity to succeed. Nextel's entrance into the market has

actually reduced competition for SMR services by reducing the number of competitive providers. Accordingly, there can be no basis for action arising out of a need to increase competition. Nextel's technology has not been shown to be appropriate for providing services, therefore, its technical justifications cannot be supported.

Nextel's greatest basis for its request is that present regulation has created a chaotic or inefficient licensing method. Applied strongly disagrees. The present rules, without waiver, are one of the great successes in regulation ever created by the Commission. The rules demand fidelity to the provision of service. The present rules require prompt construction and actual operation. The rules protect uses by public safety, while providing equitable opportunity for ambitious and successful operators, rewarding the increased provision of service to the public. Rarely in the history of the Commission has one set of rules ever produced such a vital industry, fueled by the unceasing efforts of telecommunications entrepreneurs.

The SMR market did not, in fact, begin exhibiting signs of chaos and crisis until Nextel's entrance. The Commission's grant of the Nextel waiver created a new, voracious entity which gobbled up channels and investments and the Commission's scarce resources, then returned extremely little to the marketplace in the way of new services. Now, the SMR industry is bloated with speculators, brokers, agents, financial wizards, and hangers-on. Yet, among all of this dead weight still exists the independent operator, whose primary goal is still the provision of service to the public. Nextel seeks to remove

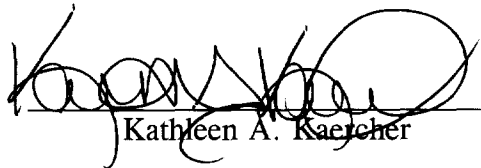
its self inflicted chaos by removing the last elements of proper activity in the market, the independent operator. After which, it will be able to stand atop its pile of unused spectrum, overreaching claims, financial machinations, and corporate manipulations to declare itself "King of the Hill". Such a success story has not been witnessed since "Yertle The Turtle" first landed on the shelves.

Conclusion

For the reasons stated above, Applied strongly urges the Commission not to adopt those proposals contained in the Notice. The public interest does not require it. The industry would not benefit from adoption. And the independent operator would be so disadvantaged that the Commission would do just as well to state, "we have decided that only Nextel may operate on SMR spectrum." At least such a statement would have the advantage of candor.

Respectfully submitted,
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By



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Dated: March 1, 1995

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I hereby certify that on this first day of March, 1995, I served a copy of the foregoing Reply Comments on the following by placing a copy in the United States Mail, first class postage prepaid:

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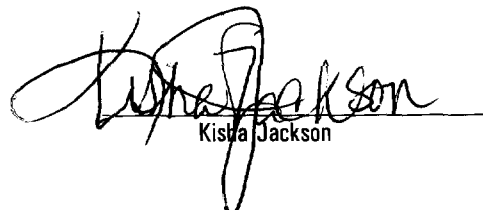
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